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MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

October Term 1974

NO. 74-385

In the Matter of
YORK INTERNATIONAL BUILDING, INC.,

Debtor-Appellant,

and

DR. RICHARD YOU,

Stockholder-Appellant,

vs.

AARON M. CHANEY,

Trustee-Appellee.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

QUESTION PRESENTED

The only question presented by the Petition For Writ Of Certiorari is:

Are there any "...special and important reasons..." to review this case on writ of certiorari?

STATEMENT OF THE CASE

The Statement of the Case contained on pages 1 through 9 of the Brief of Appellee Aaron M. Chaney, Trustee, filed in the United States Court of Appeals for the Ninth Circuit on November 16, 1973, a true copy of which is attached hereto as Exhibit "A", will supplement Appellants' Statement of the Case and will assist this court in understanding the background of this case.

ARGUMENT

The Petition for Writ of Certiorari should be denied because (1) the appeal does not merit any further review, (2)

there are no "...special and important reasons..." to review this case and (3) review would cause delay and needless expense to the estate.

1. The Appeal Does Not Merit Any Further Review.

The contentions in the Petition For Writ of Certiorari are generally the same as those in Appellants' Brief before the Ninth Circuit. Some of these contentions were never raised before the trial court. (For example, Appellants' argument that Appellant by voluntarily conveying the land to the Trustee over four years ago was deprived of his property without just compensation, was raised for the first time on appeal.)

Some of the contentions are frivolous. (For example, Appellants argue that they had no notice of the proposed

sale. Appellants were aware that the Trustee, in accordance with the Order Denying Application To Dismiss Debtor's Petition of July 24, 1969 (approved as to form by Appellants' attorney) had been actively advertising and soliciting offers for the purchase of the property for over 3-1/2 years before this sale. Appellant Dr. You's medical office throughout this period was, and still is, located in the building which Debtor owned. He paid his rent monthly to the Trustee. He could see the "For Sale" sign. Appellant and his attorneys attended numerous court hearings and took part in numerous meetings and conversations where the Trustee reported on the status of prospective purchasers. Notice of the proposed sale was sent to Appellants on

January 2, 1973 over 30 days in advance of the hearing. Appellants were present at the series of hearings on February 5, 6, 7 and 21, 1973, cross examined witnesses, presented evidence and arguments, requested and were granted a continuance and were given full procedural and substantive due process.)

Some of the contentions are moot. (For example, after the court ordered the sale of the real property, Appellants did not file a supersedeas bond or even make any request that the court stay the sale pending appeal. The Trustee was bound, both by his contractual obligation to the purchaser and by the court order to carry out the sale and he did so. The property, upon consummation of the sale, left the pos-

session and control of the Trustee and the jurisdiction of the court. The purchasers of the property are not parties in this case and never entered any appearance or participated in any proceedings before the court (except as spectators at the hearing when the sale to them was approved). There is nothing the Trustee can now do to recover the property and this contention is therefore moot.)

The Ninth Circuit Court correctly found that Appellants' contentions were without merit, frivolous, not properly before the court, or moot.

All of Appellants' contentions are discussed in greater detail in the Brief of Appellee which was filed in the Ninth Circuit Court, a copy of which is attached as Exhibit "A".

2. There Are No "...special and important reasons..." For the Court to Review this Case.

The supposed conflict between the circuits suggested by Appellants, does not exist under the facts of this case.

The Second Circuit in In Re Pure Penn Petroleum Co., Inc., 188 F.2d 851 2nd. Cir. 1951) was considering a sale of all the Debtor's assets consisting of plant and equipment and an oil and gas lease under an arrangement under Chapter XI of the Bankruptcy Act. The court pointed out that Chapter XI does not have a provision similar to § 216(10) of Chapter X (11 U.S.C.A. § 616(10)) which provides that a plan of reorganization under Chapter X may include the sale of all or any part of the debtor's property at not less than a fair upset

price and distribution of proceeds among the creditors. Under the proposed arrangement in In Re Pure Penn Petroleum Co., Inc. the Debtor's property was to be sold and the proceeds used to pay one class of unsecured creditors (merchandise creditors) in full leaving enough to pay less than 50% of the claims of other unsecured creditors (salary and noteholders). In that case no trustee was appointed, the debtor simply remained in possession. No creditor's meeting was ever held. No appraisal was made of the assets. The decision does not refer to any effort to advertise the property or to any diligent efforts to obtain the highest price available. The Second Circuit Court, in that case, understandably held that the dissenting unsecured creditor who was not to be

paid in full, had been deprived of the benefits of the provisions of safeguarding a sale of certain assets in an ordinary bankruptcy proceeding.

In this case, Chapter X, not Chapter XI, is the governing law. Here an independent trustee was appointed. He attempted diligently for over 3-1/2 years to effect a favorable sale of the real property. The court appointed a competent and disinterested appraiser. The sale was made subject to the approval of the court. The sale was not part of a plan of reorganization. The sale was for considerably more than 75% of the appraised value. Notice of the proposed sale was given, in accordance with the court's order, to Appellants and to all parties in interest. The unsecured creditors did not oppose the

sale. Those unsecured creditors who appeared at the hearings urged the court to approve the sale. The only dissent in this case was from the stockholder who would not share in the proceeds in any event because the Debtor is insolvent. In this case, the sale of the property was conducted in a manner which provided for all parties the safeguards of a sale in ordinary bankruptcy.

Were the Second Circuit presented with a factual situation such as this it would undoubtedly find, as the Ninth Circuit did, that the sale was conducted in accordance with § 116(3) of the Bankruptcy Act and that the trial court did not abuse its discretion in ordering and approving the sale.

The Third Circuit Court in In Re Solar Mfg. Corp., 176 F.2d 493 (3rd.

Cir. 1949) had under consideration the sale of substantially all of the assets of a condenser manufacturing company. The Chapter X proceeding commenced December 14, 1948. Only 7 months later, on July 5, 1949, the trustees sought a court order for the sale of virtually all of the assets of the corporation. The court noted that the trustees had brought the cash position of the company up to $499,487, had disposed of unproductive assets and that the conduct of the enterprise under the trustees had shown a very considerable improvement over that under the previous management. The court's decision does not refer to efforts, if any, which had been made to formulate a feasible plan of reorganization. The court noted that the sale contemplates a "pretty severe sacrifice

in selling properties far below appraisal." The Securities and Exchange Commission objected to the sale as did the labor union representing the employees of the company and a debenture holder on behalf of himself and other debenture holders.

In the present case the Trustee had tried for over 3-1/2 years to formulate a feasible plan of reorganization. He sought suggestions for a plan from all parties in interest including Appellants. Although the Appellants repeatedly over a course of several years assured the Trustee that they would provide additional equity capital necessary to successfully reorganize, they never provided it. The Trustee attempted to obtain capital from other sources and in fact, did arrange for a

loan for some additional capital. However, because the plan used debt rather than equity it was not considered by the court to be sufficiently feasible to warrant approval.

The Trustee in this case concurrently with his efforts to reorganize the Company, had exerted diligent and thorough efforts to effect a favorable sale of the property. He advertised it for sale in the Hawaii newspapers as well as the Wall Street Journal. He placed a "For Sale" sign on the property. He printed and distributed information sheets and brochures for the property. He discussed it with over 200 interested parties or prospective purchasers. The sale finally approved by the court was the most favorable offer presented to the Trustee during the

entire 3-1/2 years. It is fair to say that this sale was more favorable than would have been received at an auction sale "on the block" or at a sale under the ordinary bankruptcy provisions with the stigma of bankruptcy depressing the price.

In this case, unlike in In Re Solar Mfg. Corp., neither the Securities and Exchange Commission nor any debenture holder or other creditor objected. The secured creditors urged the court to approve the sale. This is perfectly understandable. The secured creditors, although the assets were sufficient to pay them in full with interest, had been stayed for over four years from enforcing their legal rights to payment. The unsecured creditors (including Appellant's nephew) even though they would

not be paid in full, urged the court to approve the sale. In this case the only objection to the sale was made by a stockholder who would not have been entitled to participate in any event whether the sale had been made as part of the plan of reorganization or in ordinary bankruptcy.

It is reasonable to suppose that if the Third Circuit Court were presented with an appeal under the facts of this case it would probably have found as the Ninth Circuit did that the sale complied with the law and that the trial court did not abuse its discretion in approving the sale.

It is, therefore, evident that this case presents no real conflict between circuits and no other reason of the special importance required by Rule 19

of the Rules of the Supreme Court of the United States.

3. Review Would Cause Delay and Needless Expense to this Estate.

At the time of the hearings on the sale of the real property in February 1973, the Trustee testified that if the sale were approved the proceeds would be sufficient to pay approximately 75% of the principal amount of the claims of unsecured creditors. Since that time, the estate has been put to the unanticipated expense of defending three appeals by the same Appellants to the Ninth Circuit Court and now is incurring the further expense of defending this Petition For Writ of Certiorari. If this court should grant the Petition, the estate will be required to incur further costs of

defense of such a magnitude that the dividends ultimately payable to unsecured creditors will be further eroded and may even be eliminated entirely.

No creditor in this case (except for the holder of the first mortgage who was paid monthly installments for a substantial portion of the proceeding) has received one dollar for the last six years since this proceeding started. Annual inflation, particularly the double digit inflation experienced recently, daily erodes the value of their claims. Further review of this case would merely prolong the hardship.

CONCLUSION

For the above reasons, it is respectfully requested that the Petition

be denied.

DATED: Honolulu, Hawaii,

October 29, 1974.

Respectfully submitted

Thomas W. Flynn

THOMAS W. FLYNN

H. William Burgess

H. WILLIAM BURGESS

NO. 73-2209

IN THE

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FILED
NOV 16 1973
CLERK

IN THE MATTER OF YORK INTERNATIONAL BUILDING, INC.,

Debtor.

YORK INTERNATIONAL BUILDING, INC., DEBTOR, AND DR. RICHARD W. YOU, STOCKHOLDER,

Appellants,

vs.

AARON M. CHANEY, TRUSTEE, MASSACHUSETTS MUTUAL LIFE INSURANCE COMPANY, MORTGAGEE, THE LIBERTY BANK OF HONOLULU, AND MID-PAC LUMBER, LTD., OF HONOLULU, KENNETH AND ROSE DUNN, CREDITORS, ET AL.,

Appellees.

On Appeal from the United States District Court
For the District of Hawaii

BRIEF OF APPELLEE AARON M. CHANEY, TRUSTEE

BURGESS & GELBER
(H. WILLIAM BURGESS)
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Honolulu, Hawaii 96817

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Trustee-Appellee.

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Appellees.

On Appeal From the United States District Court
For the District of Hawaii

BRIEF OF APPELLEE AARON M. CHANEY, TRUSTEE

STATEMENT OF THE CASE

This will supplement Appellants' Statement of the Case.

When this proceeding began on September 23, 1968, the debtor was in poor condition. Its mortgage and other obligations were in default. Its operating expenses were delinquent. On June 28, 1968, a mortgage foreclosure proceeding had been started in the Hawaii State Court by Massachusetts Mutual Life Insurance Company, holder of the 1.35 million dollar first mortgage. In addition, various judgment, mechanics' and tax liens had been filed against the corporation's building and the land on which it was located. The debtor's principal asset, its office building was dirty, needed maintenance and painting and was in a state of disrepair. The walls leaked. The air-conditioning system had broken down. The basement had been flooded. There was no alarm system. The parking facilities were inadequate. Tenants were withholding or refusing to pay rent. The corporation had many long term leases with tenants at unconscionably low rentals. The corporation's records and books were missing in part and those that were available were not kept in accordance with generally accepted accounting principles. Funds of the principal stockholders had been intermingled with corporate funds. The lease of the corporation's major tenant, the Pacific Exchange System (PACEX), a United States Government Agency, covering

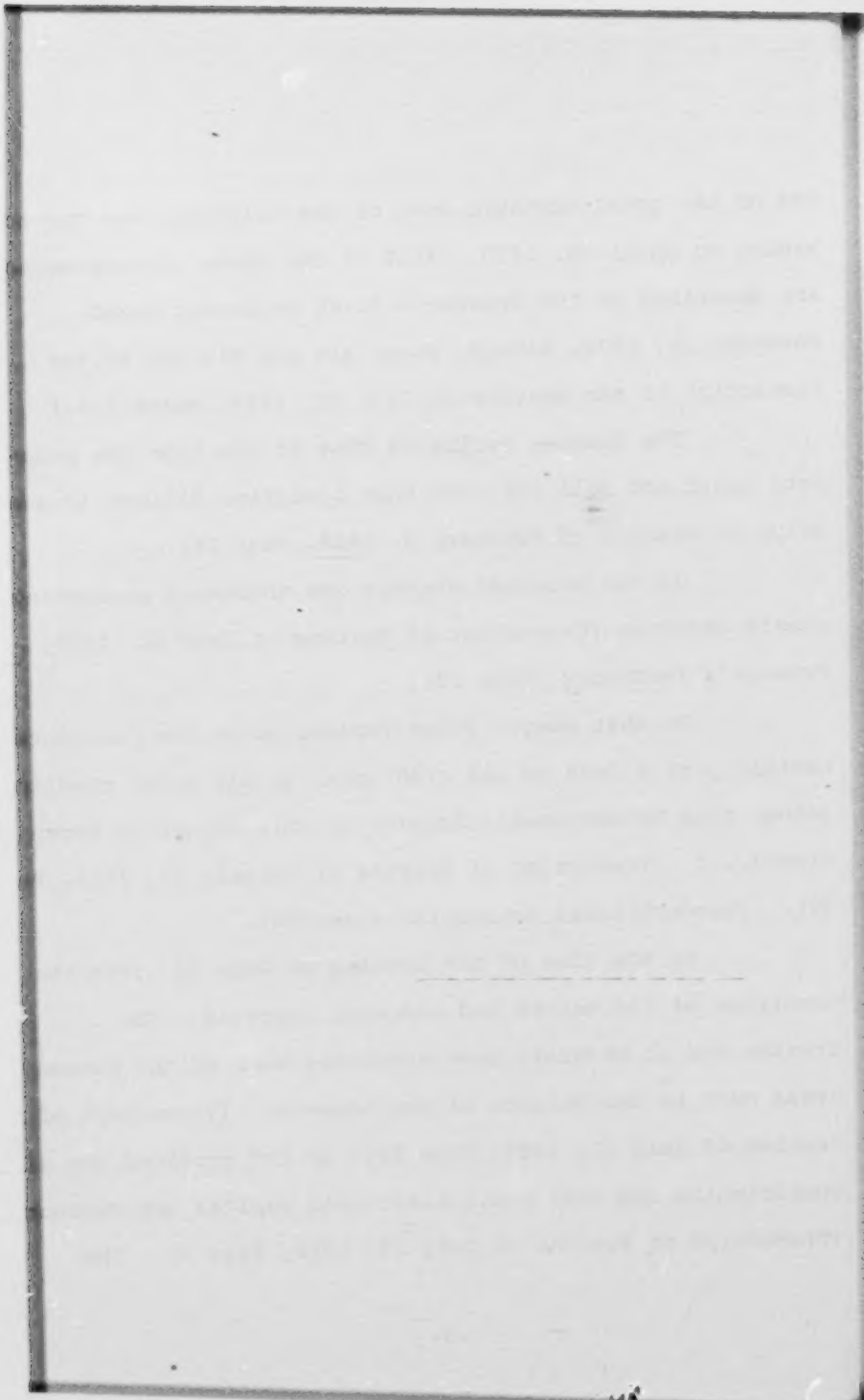
60% of the total rentable area of the building, was due to expire on April 30, 1970. (All of the above circumstances are described in the Trustee's Brief Statement dated November 25, 1970, Record, Pages 815 and 816 and in the Transcript of the Hearing of July 22, 1969, Pages 1-6.)

The Trustee estimated that at the time the property could not sell for more than a million dollars (Transcript of Hearing of February 3, 1969, Page 26).

It was marginal whether the Chapter X proceeding should continue (Transcript of Hearing of July 22, 1969, Trustee's Testimony, Page 37).

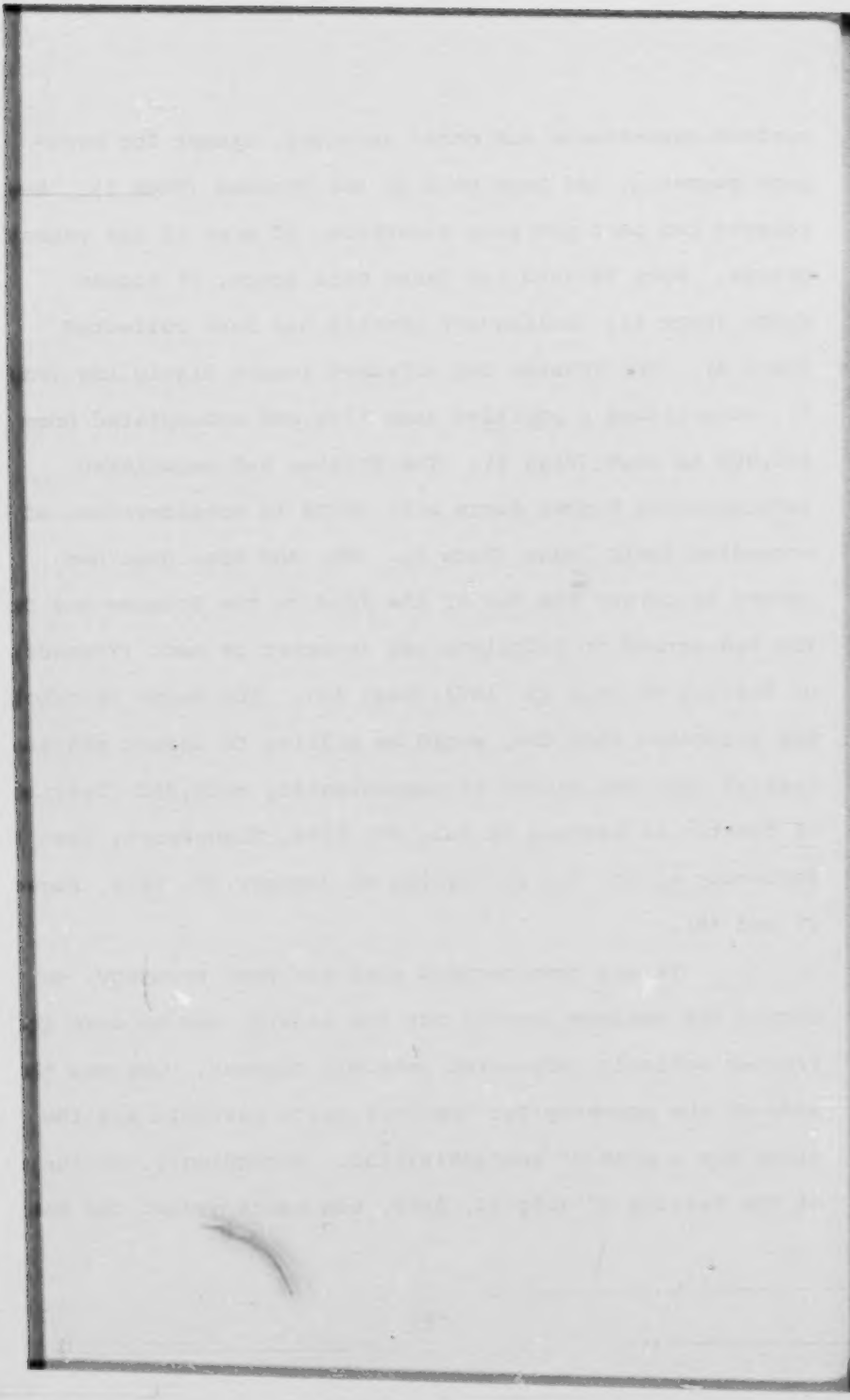
At that stage, Judge Tavares noted the "absolute certainty of a loss to all creditors, to all other creditors (other than Massachusetts Mutual) if this matter is foreclosed..." (Transcript of Hearing of January 27, 1969, Page 56). (Parenthetical expression inserted).

By the time of the hearing on July 22, 1969 the condition of the estate had somewhat improved. The Trustee had at moderate cost repainted some of the common areas much to the delight of the tenants. (Transcript of Hearing of July 22, 1969, Page 2). He had repaired the air conditioning and made small additional capital improvements. (Transcript of Hearing of July 22, 1969, Page 5). The



current operational and other expenses, except for mortgage payments, had been paid by the Trustee (Page 5). New tenants had been put into possession of some of the vacant spaces. Some tenants had taken more space, at higher rents (Page 4). Delinquent rentals had been collected (Page 4). The Trustee had effected tenant discipline (Page 6), established a positive cash flow and accumulated some $81,000 in cash (Page 5). The Trustee had negotiated substantially higher rents with PACEX in consideration of extending their lease (Page 8). Mr. and Mrs. Dunn had agreed to convey the fee of the land to the Trustee and Dr. You had agreed to quitclaim any interest he had. (Transcript of Hearing of July 22, 1973, Page 12). The major stockholders had indicated that they would be willing to inject additional capital into the estate of approximately $150,000 (Testimony of Trustee at Hearing of July 22, 1969, Transcript, Page 11; Testimony of Dr. You at hearing of January 27, 1969, Pages 47 and 48).

It was then decided that the best strategy, to obtain the maximum benefit for the estate, was to have the Trustee actively pursue two possible avenues. One was the sale of the property for the best price possible and the other was a plan of reorganization. Accordingly, at the end of the hearing of July 22, 1969, the court denied the Motion



by Massachusetts Mutual Life Insurance Company to Dismiss the Chapter X Proceeding and directed the Trustee to actively advertise and solicit offers for the purchase of the real property and authorized him to take the other necessary steps to attempt to formulate a plan of reorganization. (Record, Pages 228-232).

The Trustee thereafter actively pursued both avenues.

In pursuing the possibility of a plan of reorganization, the Trustee analyzed and contested numerous creditors' and stockholders' claims (Record, Pages 328 through 426) resulting in the reduction in the total creditors' claims from $3,872,318.31 plus interest to $1,810,603.05, including interest to December 31, 1970. (Brief Statement, Record, Page 841).

He rejected one of the unconscionable leases (Record, Page 934) and this enabled him to renegotiate the others without litigation.

He negotiated a new lease with the Department of Education of the State of Hawaii for approximately 50% of the total leaseable area of the building. (Record, Page 818).

To rid the building of its former reputation he changed the name from "York Building" to "1270 Queen Emma

Building". (Hearing of February 7, 1973, Page 43).

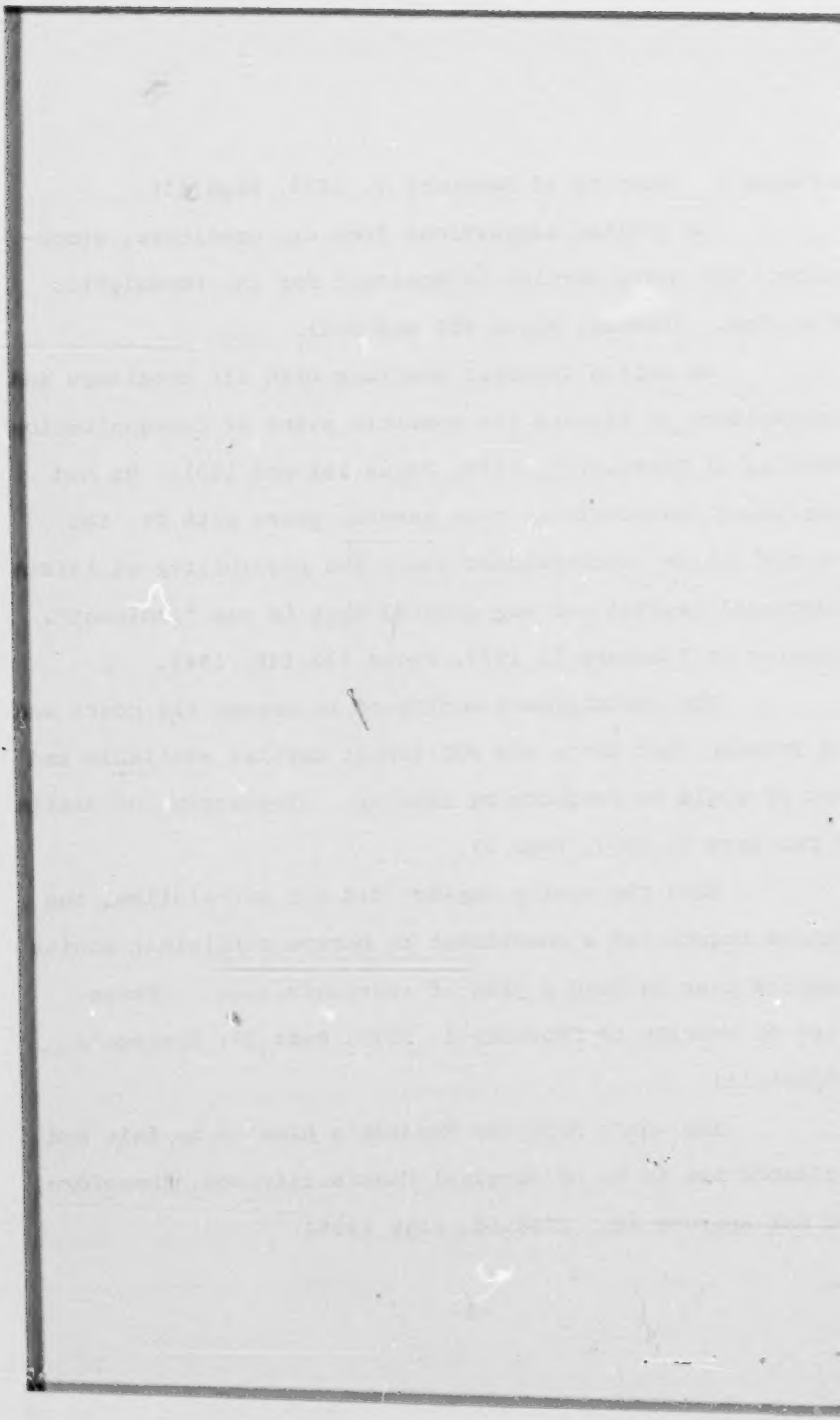
He invited suggestions from all creditors, stockholders and other parties in interest for the formulation of a plan. (Record, Pages 821 and 822).

He called informal meetings with all creditors and stockholders to discuss the possible plans of reorganization. (Hearing of February 7, 1973, Pages 151 and 152). He had continuing conversations over several years with Dr. You and the insider stockholders about the possibility of raising additional capital and was assured that it was "imminent". (Hearing of February 7, 1973, Pages 130-138, 154).

The stockholders continued to assure the court and the Trustee that there was additional capital available and that it would be forthcoming shortly. (Transcript of Hearing of February 5, 1973, Page 3).

When the equity capital did not materialize, the Trustee negotiated a commitment to borrow sufficient monies from the bank to fund a plan of reorganization. (Transcript of Hearing of February 6, 1973, Page 38; Trustee's Exhibit 11).

The court held the Trustee's plan to be fair and equitable but to be of marginal feasibility and, therefore, did not approve it. (Record, Page 1238).



The Trustee described his sales activities at the hearing on April 14, 1973 (Transcript, Page 23, commencing at Line 21):

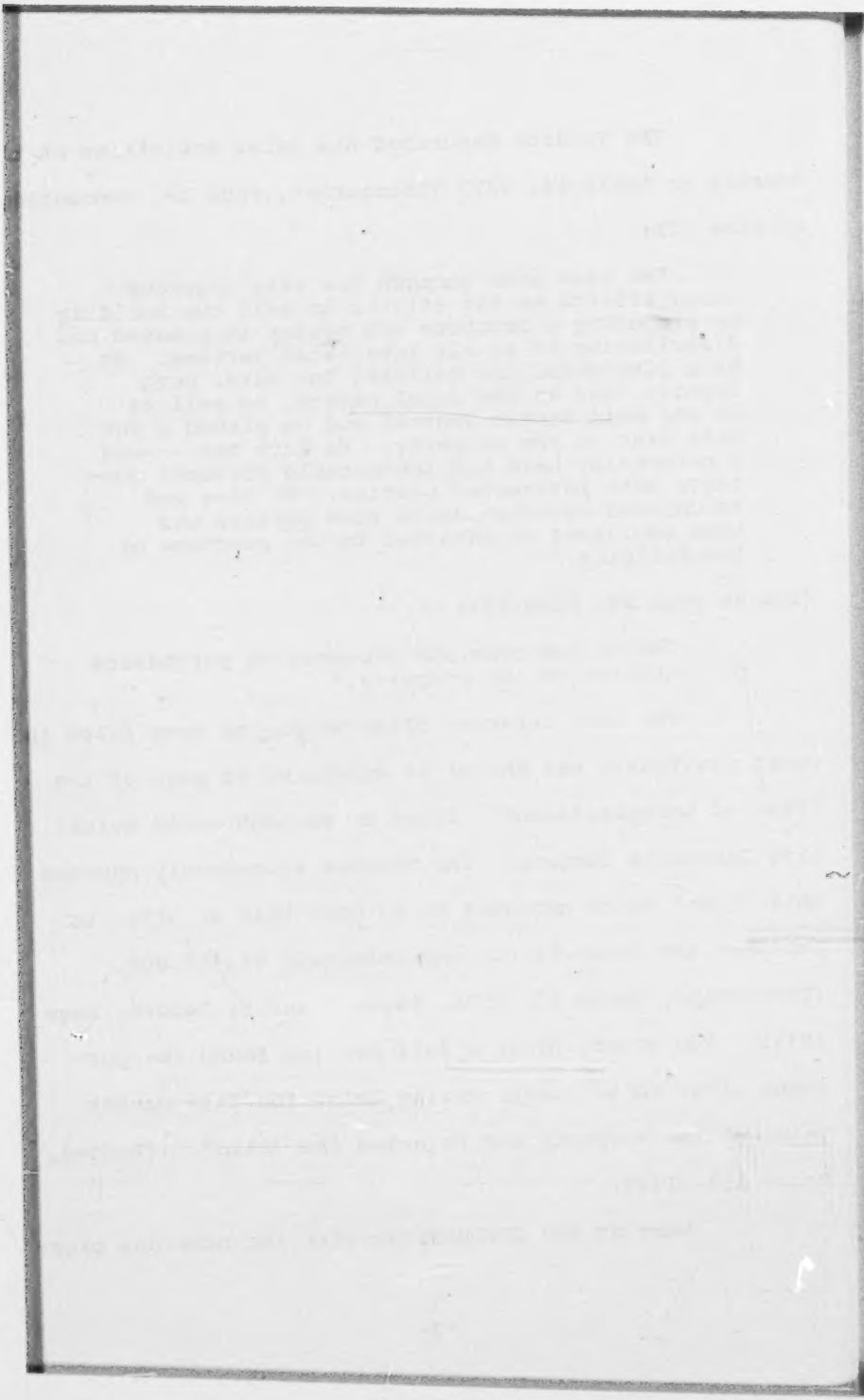
> "We have gone through the very rigorous sales efforts or the efforts to sell the building by preparing a brochure and having it printed and distributing it to all interested parties. We have advertised the building for sale, both locally, and in the local papers, as well as in the Wall Street Journal and we placed a for sale sign on the property. We have had -- and I personally have had innumerable personal contacts with interested parties. We have had voluminous correspondence from parties who have expressed an interest in the purchase of the building."

(and at Page 48, Line 15):

> "We've had over 200 prospective purchasers or inquiries on the property."

The only purchase offer which had been filed in court previously was the offer submitted as part of the "Plan of Reorganization" filed by Massachusetts Mutual Life Insurance Company. The Trustee strenuously opposed this "Plan" which amounted to no more than an offer to purchase the property for approximately $1,450,000. (Transcript, March 10, 1972, Pages 7 and 8; Record, Page 1011). The court, after a full hearing found the purchase offer to be substantially below the fair market value of the property and rejected the "Plan". (Record, Pages 1134-1136).

None of the discussions with the numerous pros-



pective purchasers resulted in an offer as favorable as the offer received from National Securities and the Lims. (Hearing of February 6, 1973, Page 81).

At the beginning of the hearings commencing February 5, 1973, the Trustee's recommendation to the court was that either the Trustee's Plan of Reorganization or the sale to National Securities would be in the best interests of the estate. (Hearing of February 5, 1973, Pages 1 and 2).

The court at the hearings of February 5, 6, 7 and 21, 1973, listened to the testimony, examined the documentary evidence, considered the positions of the various parties and the arguments of their counsel and finally found that it was in the best interests of the estate that the real property be sold, that the offer received from Mr. and Mrs. Lim was a fair and reasonable price for the property and directed the Trustee to sell the property. (Order Authorizing Sale of Real Property, Record, Pages 1238-1240).

The Trustee in accordance with the court's order and the sales contract conveyed the property to the purchasers, received the full purchase price and completely consummated the sale. (Affidavit of Aaron M. Chaney dated July 6, 1973 filed with the Motion to Dismiss Appeal on July 11, 1973).

ARGUMENT

1. A SALE OF PROPERTY IS NOT THE SAME AS A PLAN OF REORGANIZATION. THE BANKRUPTCY ACT ESTABLISHES PROCEDURES FOR SALES OF PROPERTY AND ENTIRELY DIFFERENT PROCEDURES FOR A PLAN OF REORGANIZATION. THIS APPEAL DEALS WITH A SALE OF PROPERTY. THE PLAN OF REORGANIZATION PROCEDURES DO NOT APPLY AND WOULD BE INAPPROPRIATE. THE COURT IN THIS CASE PROPERLY FOLLOWED THE PROCEDURES FOR THE SALE OF PROPERTY.

Appellants argue that the Order Authorizing Sale of Real Property is void because it deprives them of their property without due process of law. (Appellants' Brief, Page 33).

To support this contention, Appellants' reasoning runs as follows: In a Chapter X proceeding a "sale" is also a "reorganization". As a reorganization, a sale is subject to the same procedural requirements as any other plan of reorganization. The court did not follow the regular course laid out for approval and confirmation of reorganization plans. Therefore, the order deprives them of their property without due process and is void. (Appellants' Brief, Pages 33 to 36).

Appellants' argument fails because a sale of property is entirely different from a plan of reorganization and the procedures to be followed are also entirely different.

The mandatory provisions of a plan of reorganization are set forth in § 216 of Article X of Chapter X of the Bankruptcy Act (11 U.S.C.A. § 616). A contract for the sale of property would normally not contain any provision altering or modifying the rights of the seller's creditors, or provide for the payment of costs and expenses of administration or rejection of executory contracts or prohibit non-voting stock or contain any of the other mandatory provisions of § 216. A real estate salesman who tried to insert such provisions in his sales contracts would probably not earn many commissions. A sale of real property, such as we are dealing with in this case, consists of an offer, acceptance, hearing, court approval and conveyance of the property. None of the mandatory provisions for a plan of reorganization are required by the Bankruptcy Act or by any case law or custom or common sense in the case of a sale of property.

Section 172 of the Bankruptcy Act (11 U.S.C.A. § 572) requires that the court after hearing on a plan of reorganization, if the scheduled indebtedness of the debtor exceeds three million dollars shall, and if the schedule indebtedness does not exceed three million dollars may, submit the plan to the Securities and Exchange Commission for examination and report. It would make no sense for the judge to submit proposed sales of real property to the Securities and Exchange Commission. Real property sales are not within the particular expertise of the Securities and Exchange Commission and they could offer little of value to the court in considering property sales.

Section 174 of the Bankruptcy Act (11 U.S.C.A. § 574) requires that the court enter its order approving a plan of reorganization if in the judge's opinion the plan complies with the provisions of § 216 and is fair and equitable, and feasible. A sale of property, such as in this case, would not comply with the provisions of § 216. "Fair and equitable" as used in Chapter X are words of art denoting the absolute priority

doctrine and other unique concepts applicable only to a plan of reorganization. There would be no reason for a sale of property to comply with § 216 or with these unique concepts.

Section 175 of the Bankruptcy Act (11 U.S.C.A. § 575) requires that upon approval of a plan by the judge the trustee submit the plan together with summaries and other materials to creditors and stockholders who are affected by the plan. This procedure would be unnecessary where a sale of property has already been approved by the court after full hearings.

Section 179 of the Bankruptcy Act (11 U.S.C.A. § 579) provides that, after a plan has been accepted by two-thirds of the creditors of each class affected by the plan, another hearing be held to consider the confirmation of the plan and objections to confirmation. This procedure would be unnecessary in the case of a sale of property and would be so time consumming and cumbersome that it would impede and obstruct most sales.

Section 221 of the Bankruptcy Act (11 U.S.C.A. § 621) provides that the judge shall confirm a plan if

he is satisfied that among other things, Article X of Chapter X has been complied with and the identity, qualifications and affiliations of the persons who are to be directors or officers or voting trustees have been fully disclosed. A sale of property would not comply with Article X and would not disclose directors, officers or voting trustees and would have no reason to do so.

Section 228 of the Bankruptcy Act (11 U.S.C.A. § 628) provides that upon consummation of the plan the judge shall enter a final decree discharging the debtor from all its debts and liabilities. There would be no reason to discharge the debtor from any liabilities upon the consummation of a sale of property.

It is easy to see from the brief review above, that the complicated provisions and procedures for plans of reorganization under Chapter X cannot be forced to fit sales of property. Indeed if, to sell property, it were necessary to go through these long, complex and expensive steps, it would as a practical matter be virtually impossible for a Chapter X estate ever to sell property.

Three cases are cited by Appellants in support of their assertion that a "sale" is also a "reorganization" and that, therefore, the same procedures must be followed. However, not one of those cases supports such an assertion.

In re Lorraine Castle Apartments Bldg. Corp. 149 F.2d 55 (7th Cir. 1945) dealt with a trustee's plan of reorganization which provided that the major asset of the corporation, an apartment building, be offered for sale at public auction for not less than $75,000 and that the proceeds be used to pay bondholders in full with principal plus interest and the balance to stockholders. The trustee's plan further provided that if the upset price could not be realized a new corporation would be formed the capital stock of which would be issued to bondholders. The debtor had proposed a plan of reorganization which would allow stockholders to participate without paying bondholders in full. The court disapproved the debtor's plan but approved the trustee's plan. The court held that the trustee's plan was within the language of § 216(10) of the Bankruptcy Act (11 U.S.C.A. §616(10)) which provides that a plan of

reorganization "...may include...the sale of all or any part of its property...at not less than a fair upset price..." and that the trustee's plan was fair and equitable.

In re Chelsea Hotel Corp., 246 F.2d 133 (3rd Cir. 1957) held, over the objection of stockholders, that a plan of reorganization may provide for the liquidation of the debtor's property, a well known boardwalk hotel in Atlantic City, New Jersey.

In re Porto Rican American Tobacco Co., 112 F.2d 655 (2nd Cir. 1940), the court approved the trustee's plan of reorganization which provided for the immediate sale of the debtor's principal asset. The court held, over the objection of stockholders, that a plan involving ultimate liquidation is not contrary to the terms of the reorganization provisions of the Bankruptcy Act, citing § 216(10).

These three cases simply recognize that a plan of reorganization may include a sale of the principal assets of the debtor. Not one of them holds that a sale of the principal assets of the debtor must be done by a plan of reorganization. Not one of these

cases even suggests that procedures for a sale or property under Chapter X must follow the same procedures as for a plan of reorganization.

In this case the sale of the property is not part of any plan of reorganization. The buyer and the seller did not choose to structure it as part of a plan and indeed there would be no reason for them to do so.

Further, even if this sale were included as a part of a plan of reorganization, the corporation would be insolvent since its total assets including the sales price and the other assets would be less than the total liabilities. Under the absolute priority doctrine (6A Collier on Bankruptcy ¶99.10, P. 214) and under § 216(8) of the Bankruptcy Act (11 U.S.C.A. §616(8)) the stockholders therefore would be prohibited from participating in the plan. The stockholder Appellants would receive nothing either under the sale of the property or under a plan of reorganization which includes the sale and therefore in that event would not benefit in the slightest from such procedure.

The jurisdiction of the court and the procedures to be followed for the sale of real property in a Chapter X proceeding are well established.

Section 116 of Chapter X of the Bankruptcy Act (11 U.S.C.A. § 516) provides that,

> "Upon the approval of a petition, the judge may, in addition to the jurisdiction, powers, and duties in this chapter conferred and imposed upon him and the court -
>
> . . .
>
> (3) authorize a receiver or a trustee or a debtor in possession, upon such notice as the judge may prescribe and upon cause shown, to lease or sell any property of the debtor, whether real or personal, upon such terms and conditions as the judge may approve;..." (Emphasis added.)

The jurisdiction of the court and discretion of the judge in Chapter X to sell real property of the debtor are discussed in 6 Collier on Bankruptcy, ¶ 3.27[2] at Page 623,

> "Section 116(3) confers jurisdiction to authorize a lease or sale of real or personal property by the trustee or debtor 'upon cause shown.' What constitutes sufficient cause must necessarily depend upon the circumstances of each case, but the matter rests in the sound discretion of the judge. As a general proposition, a lease or sale may be ordered where it is to the advantage of the estate, or where it will aid the ultimate objective of the proceeding, or where

the property is perishable. Certainly, an improvident lease or sale should not be permitted. But the fact that a sale may eventually compel liquidation is not a controlling consideration. We have seen elsewhere that if a petition is approved as filed in good faith, the plan of reorganization later proposed may provide for a sale of the property that is in effect a liquidation. This is because circumstances may disclose that such a course is the only acceptable method of financial relief. Likewise, under § 116(3) if the facts impel a decision that the debtor's property be sold prior to the working out of a reorganization plan, the judge may authorize the sale to be made. And even if such disposition involves all the income-producing property of the debtor, the order may be justified. Section 116(3) says 'any property of the debtor, whether real or personal', and even though the sale may practically prevent the adoption of a reorganization plan and thus defeat the purpose of the proceeding, it may be permitted where conditions warrant." (Emphasis added.)

As to the notice required, Collier continues at Page 628:

"Authorization by the judge under § 116(3) must be made 'upon such notice as the judge may prescribe'. Section 58a(4), requiring notice of all sales of property except on certain conditions, has no applicability under Chapter X unless bankruptcy liquidation is ordered, since it is inconsistent and in conflict with § 116(3). Conceivably the judge under § 116(3) may order a lease or sale without notice, if under the circumstances an immediate lease or sale is necessary. The lease or sale

> ay be made 'upon such terms and conditions' as the judge may approve. Section 70f, which among other things requires an appraisal before a sale and prescribes certain restrictions concerning sales by auctioneers, is expressly made inapplicable under Chapter X by § 102 unless and until an order is entered that bankruptcy be proceeded with. Hence the judge may if he sees fit order a sale without an appraisal. Nor is the judge bound by the terms of General Order 18, dealing with sales of property, for by virtue of General Order 52(2) this order is likewise inapplicable under Chapter X unless the judge orders that bankruptcy be proceeded with. A disposition of property, according to the sound discretion of the judge, may be made by public or private sale, in bulk or in parcels, for cash or credit, and subject to or free from liens. Where property is sold, the title thereto shall be conveyed to the purchaser by the trustee or debtor in possession."

Thus it can be seen that the judge has jurisdiction under Chapter X to order sale of the debtor's property prior to working out of a reorganization plan even if such disposition involves all of the income producing property of the debtor and even though the sale may prevent the adoption of a reorganization plan, if in the sound discretion of the judge such an order is justified. The sale may be made "upon such notice as the judge may prescribe" or even without notice if an immediate sale is necessary in the discretion of the judge.

In this case the Application for Approval of Sale of Real Estate or Approval of Plan or Other Instruction was filed December 29, 1972. (Record, Page 1163). The court fixed January 19, 1973 as the date for hearing and ordered the Trustee to give notice in the form attached to the court's order by mail to all creditors, stockholders, and certain other parties in interest. (Record, Pages 1198 and 1199).

The Trustee mailed the required notice to all creditors and stockholders on the same day, December 29, 1972. (Trustee's Affidavit of Mailing, Record, Pages 1262 through 1264).

The original hearing date was postponed at the oral request of both the attorneys for the Appellants and the attorneys for Massachusetts Mutual Life Insurance Company. The first hearing on the proposed sale and the proposed plan was held on February 5, 1973. (Transcript of Hearings, January 19, 1973 and February 5, 1973).

Thus the Appellants were given formal notice of the proposed sale of the real property more than thirty (30) days prior to the first hearing, considerably more than the minimum time required by the Bankruptcy Act.

As to the form of notice, even under § 58a(4) of the Banrkuptcy Act (11 U.S.C.A. § 94a(4)), there is no particular form of notice required by the Bankruptcy Act or General Orders. 3 Collier on Bankruptcy, Page 500. The form of the notice in this case sets forth all of the essential terms of the proposed sale and the form was approved by the court in advance. (Record, Pages 1200 and 1201).

Appellants complain at Pages 35 and 36 of their brief that there was no prior notice of the sale to the Lims. This point was not raised before the trial Judge and is presented for the first time on appeal.

The Lim offer was not delivered to the Trustee until the afternoon just before the last hearing. (Transcript of Hearing, February 21, 1973, Page 163). If National Securities had submitted a higher bid, the court would, no doubt, have allowed it. However, National Securities did not choose to make any higher bid. If the Lim offer were less favorable than the proposed sale to National Securities or if it adversely affected the rights of Appellants, the Appellants' complaint might have some validity. However, the Lim sale was significantly more

favorable to the estate in that the cash down payment was much greater and there was no real estate commission. The sale to the Lims, rather than the less favorable sale to National Securities, could not conceivably have any adverse effect on the Appellants.

The events leading up to the sale to the Lims are somewhat analogous to the procedures followed in the Hawaii State Courts in the sale of real property by a probate estate. Under § 531-29, Hawaii Revised Statutes, after the executor or administrator enters into a contract for the sale of real property of an estate, a notice of the proposed sale is sent to interested parties and published. At the hearing other interested purchasers are permitted to submit higher bids. The court then approves the sale most favorable to the estate. This probate scheme for obtaining the best prices for estate sales would be destroyed if it were necessary to republish and have further notice and hearing before the highest bid could be accepted.

The probate procedure is similar to what happened in this case, the result of which was that this

estate received the benefit of a sale substantially more favorable than that originally proposed. This favorable sale would have been lost if the court had to send out further notices and to schedule a later hearing. (Transcript of Hearing, February 21, 1973, Page 193).

The court signed the Order Authorizing Sale of Real Property on March 2, 1973 (Record, Page 1235). Appellants had received formal written notice of the proposed sale two months before.

The hearings were conducted on four different days over a period of more than two weeks from February 5 to February 21, 1973. The hearings were postponed twice at the request of the attorneys for Appellants. At the hearings, the Appellants cross-examined witnesses, presented documentary evidence, gave testimony of their own witnesses, and presented arguments to the court. Appellants were given a full opportunity to be heard and fully availed themselves of this opportunity.

The court heard the evidence, weighed the conflicting testimony, considered the positions of the various interested parties, and finally made its finding

of fact that it was in the best interests of the estate that the real property be sold, that the Lim offer was a fair and reasonable price for the property, and that it was in the best interests of the estate that the sale to the Lims be approved and authorized. These findings of fact by the trial court have not been contested in Appellants' opening brief and are overwhelmingly supported by the record.

In summary then the record shows that the Order Authorizing Sale of Real Property was properly issued after due notice and full hearing and in compliance with all of the requirements of the Bankruptcy Act. The Appellants were afforded their full constitutional rights and were not deprived of their property without due process.

2. THE COURT DID NOT ABRIDGE APPELLANTS' CONSTITUTIONAL RIGHTS BY DENYING THEIR MOTION FOR RECONSIDERATION WITHOUT ORAL ARGUMENT. THEIR MOTION PRESENTED NO NEW ISSUE OF FACT OR LAW AND AMOUNTED TO NOTHING MORE THAN A REQUEST TO REARGUE MATTERS WHICH HAD ALREADY BEEN FULLY LITIGATED. DELAY WOULD HAVE PREJUDICED THE ESTATE.

Appellants argue at Page 37 of their brief that the court abridged their constitutional rights by denying their motion for reconsideration without a hearing.

Appellants' "Motion for Reopening, Rehearing and Reconsideration" states eight "grounds" (Record, Pages 1246 and 1247). Reading of these "grounds" show them to be simply eight sentences of argument. No fact is asserted which was not presented at the hearings. No issue of law is raised which was not argued at the hearings.

The trial court in its order denying the Motion stated: "The motion itself in its 'eight grounds' does but set forth conclusitory arguments on matters which were heretofore fully explored and squarely decided by the court adversely to Dr. You, in the course of the hearings leading up to the court's ordering the sale of debtor's property. Not even one new or unresolved fact or question of law is presented by the motion (except possibly counsel's assumption of ignorance on the part of the court as set forth in Ground 8)." (Record, Page 1254).

There is no authority found anywhere in the

Federal Rules of Civil Procedure for a motion for "re-opening, rehearing or reconsideration".

Motions for a new trial or to alter or amend judgments are provided for under Rule 59 of the Federal Rules of Civil Procedure. Appellants' Motion for Reopening, Rehearing and Reconsideration could conceivably be construed as a motion for new trial or to alter or amend the judgment.

The three grounds for new trial most commonly known in court (non-jury) actions are manifest error of law, manifest error of fact, or newly discovered evidence. 6A Moore's Federal Practice, ¶59.07, Page 59-94. However, new trial or rehearings are not granted simply to reargue or relitigate.

> "Just as at law, a rehearing in equity and its present counterpart, a new trial in a court action, will not lie merely to relitigate old matter; nor will a new trial normally be granted to enable the movant to present his case under a different theory than he adopted at the former trial. ..."

6A Moore's Federal Practice ¶59.07, Page 59-93.

A motion for new trial is addressed to the discretion of the trial court and is not subject to reversal unless the court has abused its discretion.

"As the motion for new trial is addressed to the discretion of the trial court, its ruling on such motion is not subject to reversal unless its order was made under the compulsion of a mistake of law, or it failed to exercise its discretion, or abused its discretion."

6A Moore's Federal Practice, ¶ 59.07, Page 59.99.

Even if Appellants' motion is given the benefit of the doubt and considered as a motion for a new trial or to alter or amend judgment under Rule 59, it falls short, on its face, of stating any meritorious ground. It states no manifest error of law. It does not include a single legal citation. It points out no manifest mistake of fact on the part of the court. (Indeed, Appellants in their entire opening brief do not even assert that the court's findings of fact are erroneous.) The motion points to no newly discovered evidence. The motion does not raise a single issue of fact or law which was not raised at the four previous hearings before the court.

There is no constitutional requirement for oral argument on motions generally. It is not unusual for trial and appellate courts to direct that motions be submitted upon motion papers and briefs without oral argument. For example, Rule 6 of the Rules of the United States Court of Appeals for the Ninth Circuit provides,

"(e) No Oral Argument unless Ordered. Motions may be considered and decided in chambers, and no oral argument will be allowed unless requested by the court. In the event the court requests oral argument upon a motion, fifteen minutes shall be allowed to each side unless otherwise ordered."

Also, see, Bagby v. United States, 199 F.2d 233 (Ca. 8th 1952) where the local rules of the district court provided that motions for summary judgment would be taken as submitted upon the motion papers, without oral argument, unless a party makes a request therefor.

The Ninth Circuit, in Dredge Corp. v. Penny, 338 F.2d 456 (9th Cir. 1964) has said in considering a motion for summary judgment, "But, in view of the language of Rule 56(c), and having in mind that the granting of such a motion disposes of the action on the merits, with prejudice, a district court may not, by rule or otherwise, preclude a party from requesting oral argument, nor deny such a request when made by a party opposing the motion unless the motion for summary judgment is denied." In that case, the Ninth Circuit was considering a motion for summary judgment which was granted without the opposing party having a right to oral argument. The effect of

granting the motion was to dispose of the case on the merits without the party ever having had his day in court. It is easy to understand why this court would so hold in that case. However, the present case is entirely different. This is no motion for summary judgment. The Appellants have had their full day in court. The Appellants attended hearings on four different days extending over more than two weeks, presented documentary evidence and testimony of witnesses, cross examined witnesses, and were given a full opportunity to present their case. Appellants had a full hearing on all points stated in their motion.

Even in the case of motions for summary judgment, there are circumstances where oral argument is dispensed with. "But even when a party is entitled to oral argument, as a general proposition there will be circumstances when a court may properly terminate oral argument or even dispense with it." 6 Moore's Federal Practice, ¶56.14[1], Page 2258. Sarelas v. Prikos, 320 F.2d 827, 828 (7th Cir. 1963) and Skolnick v. Martin, 317 F.2d 855 (7th Cir. 1963).

Finally, the most compelling justification for

the court's denial of Appellants' motion without oral argument was the harm which could be caused by delay. Appellants filed the motion on March 8, 1973 (Record, Page 1245) and set it for hearing on March 19, 1973 (Record, Page 1250). This hearing date was some 27 days after the hearing on February 21, 1973 at which the court had orally authorized the sale of real property. The offer from Mr. and Mrs. Lim for the purchase of the property was dated February 19, 1973 and provided that "This offer to purchase is subject to final approval of the court within 60 days after the initial approval but not to exceed more than 65 days from the date of contract." (Trustee's Exhibit 17, February 21, 1973). This provision was inserted by the purchasers so that if the court's approval had not become final within 65 days from the date of the contract (that is by April 24) they would have the right to withdraw the offer. Appellants' motion, by tolling the running of the time for appeal, delayed the finality of the court's order. If the hearing were held as scheduled on March 19, 1973 and the order denying the motion not signed until sometime thereafter, the delay would have jeopardized and, perhaps, caused the loss of this advantageous sale for the estate.

Appellants Motion for Reopening, Rehearing and Reconsideration was no more than a request to reargue. Appellants had already enjoyed a full hearing on all points mentioned in the Motion. It can hardly be said that the court's refusal to allow Appellants to rehash the same arguments at another hearing has deprived Appellants of any rights whatsoever. Delay could have severely damaged the estate by jeopardizing the best offer received in 5 years of administration of this estate.

The court in the exercise of its sound discretion, found the motion on its face to be not in compliance with the court's rules of procedure, to present no issue of law or fact which had not already been fully argued at the previous hearings, and properly and wisely denied the motion.

3. APPELLANTS' CLAIM THAT THEY WERE DEPRIVED OF THEIR CONSTITUTIONAL RIGHTS BY STATEMENTS MADE AT A HEARING ONE AND A HALF YEARS AGO IS NOT ONLY WITHOUT MERIT BUT IS IRRELEVANT TO THIS APPEAL.

Appellants on Pages 37, 38 and 39 have picked

out from the record isolated comments of the court on April 14, 1972 at a hearing on interim allowance for the Trustee. The Judge's comments which are complained of by the Appellants, when read as part of the entire record, are quite proper and well taken. The Judge recognized the Trustee's superb efforts which had held off the foreclosure action, rehabilitated the building, removed the non-paying tenants, raised the rents, achieved 98% occupancy, established order out of chaos in the records, accomplished a postive cash flow and brought the corporation up to a condition where it might be possible to pay the creditors and, with new capital, even to salvage something for stockholders. (See Statement of the Case, this Brief).

After the hearing on April 14, 1972, Judge Tavares allowed interim compensation to the Trustee. (Record, Page 1129). Appellants were aware of this allowance and had the right to petition this court for leave to appeal under § 250 of the Bankruptcy Act (11 U.S.C.A. § 650) and under Rule 6 of the Federal Rules of Appellant Procedure. They did not appeal. The time has long passed (over one and a half years) for appeal

of that order. It is not now before this court and is entirely irrelevant to the present appeal.

4. APPELLANT YOU IS NOT ENTITLED TO HAVE THE VALUE OF THE FEE "RESTORED". ALL HIS CLAIMS AGAINST THE ESTATE WERE SETTLED BY VOLUNTARY STIPULATION THREE YEARS AGO.

Appellants argue on Page 39 of their brief that Appellant You should have the full value of the fee "restored" to him if the sale is not voided.

Appellant You had originally held title to the land on which the York Building was later located. He leased it to the debtor corporation.

On June 2, 1966, as part of the transaction under which Massachusetts Mutual Life Insurance Company made its loan of $1,350,000, the debtor corporation and Dr. You mortgaged the building and land to Massachusetts Mutual Life Insurance Company. (Record, Page 68, Transcript of Hearing, February 3, 1969, Pages 44, 58).

On June 27, 1966, by Deed recorded in Liber

5365 at Page 563, Dr. You conveyed the fee title to the land to Mr. and Mrs. Dunn as security for a $120,000 loan to the corporation. (Transcript of Hearing of July 22, 1969, Page 12).

By July of 1969, the Massachusetts Mutual Life Insurance Company mortgage had a balance including principal and delinquent interest and fees of approximately $1,500,000. (Transcript of Hearing of July 22, 1969, Page 27).

Dr. You in July of 1969 did not have legal title to the land and had little or no equity in the land since any interest he had was subordinate to the $1,500,000 balance of the Massachusetts Mutual Life Insurance Company mortgage, the $120,000 lien in favor of Mr. and Mrs. Dunn and the judgment and tax liens of various other creditors. (Transcript of Hearing of February 3, 1969, Pages 61, 62, 63 and 64).

The Trustee estimated the value of the property (land and building) to be about one million dollars when the Chapter X proceeding started. (Transcript of Hearing of February 3, 1969, Page 26).

The circumstances of the conveyance of the

fee interest to the Trustee were described by the Trustee in his testimony at the hearing of July 22, 1969 (Transcript commencing at Page 12, Lines 4 through 26, and Page 13, Lines 1 through 4)

> "You perhaps would be in a better position to give further details, but we have met with the representative of the Dunn family, Mr. and Mrs. Dunn, who presently hold title to the fee of the land underlying the building. As you recall, York International has a leasehold interest only, its main asset being in the building per se, and that the land is being leased from Mr. and Mrs. Kenneth Dunn. Mr. and Mrs. Dunn took fee title to the land as security for a $120,000 loan to the corporation. And if Mr. and Mrs. Dunn are willing to convey, we have oral assurances and/or documents to convey the fee of the land to the trustee as an assist in attempting to save the estate.
>
> Q And a quit claim deed has been prepared and forwarded to the Dunns for signature?
>
> A To the Dunns for signature.
>
> Q And also for signature by Dr. You for claiming any interest he may have in the fee of the land to you as trustee?
>
> A Right.
>
> Q And we have been assured by their attorneys, Mr. Wilfred Youth and by Mr.

Edward Kim on behalf of Dr. You, that their clients will execute a quit claim deed?

A Yes. So what we have done, Your Honor, is to bring the fee title into the estate."

Dr. You was present at the hearing as was Mr. Wilfred Youth, the attorney for Mr. and Mrs. Kenneth Dunn, and Harold Fong, the attorney for the debtor, now the Appellant. (Transcript of Hearing of July 22, 1969, Page 22).

The Trustee also testified as to his plans to attempt to sell the property for the best possible price. (Transcript of Hearing of July 22, 1969, commencing at Page 24, Line 17).

"A I am sorry I did cause confusion there, Mr. Bunn. My position is to continue to operate the estate, to get a sale, currently to offer the property for sale. So that whatever is the best will be for the benefit of the creditors.

Q And if I understand you correctly, what I am saying is, your wish is to continue to expose this for sale?

A Yes.

Q Attempting to get what you consider

a fair and equitable price for the property?

A Yes, sir.

. . ."

(Transcript of Hearing of July 22, 1969, Page 25, commencing at Line 24, and Page 26, Lines 1 and 2).

"Q So you wish to continue to advertise this, to expose it for sale to realtors?

A Yes, sir.

Q Seeking to get a price --

A The best possible price there is."

The attorney for Massachusetts Mutual Life Insurance Company asked specific questions about the conveyance of the fee at Pages 28 and 29 and, finally, in argument to the court, the attorney for the Trustee stated at Page 36:

"As to the latest development as to the conveyance of the fee, Your Honor, we have the assurance of Mr. Youth who is present in Court and also Mr. Fong who is present in Court, -- and Dr. You himself is present

> in Court -- that all of the necessary parties will convey and sign quickly the conveying interest in the fee to Mr. Chaney as trustee. This means that the trustee has at his disposal for use either as part of the plan of reorganization or as part of the sale of the property the total assets, including leasehold interest and the fee simple, ..."

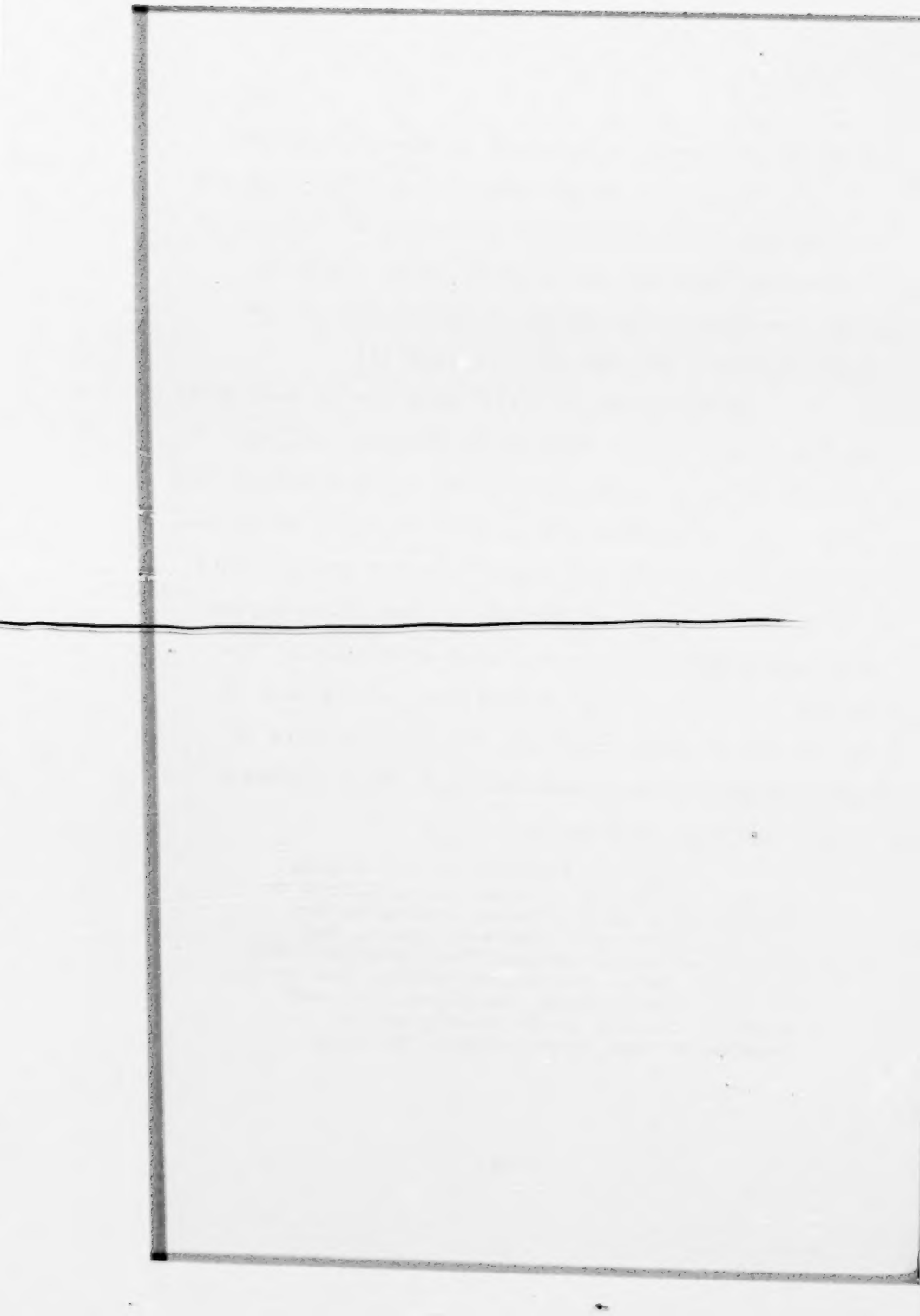
There is no suggestion of any agreement, express or implied, on the part of the Trustee to pay Dr. You any "compensation" for his quitclaim of any interest he might have in the land. Indeed, if anyone were to be compensated it would have been either Massachusetts Mutual Life Insurance Company or Mr. and Mrs. Dunn or the other creditors who held tax and judgment liens on the property. The conveyance by Mr. and Mrs. Dunn, who held legal title, was a conventional quitclaim deed unconditionally conveying to the Trustee all right, title and interest in the property. It was clearly discussed that the Trustee would make an active effort to sell the property and there was not the remotest suggestion that in the event of a

sale, Dr. You would be entitled to any compensation.

Following the hearing, Mr. and Mrs. Dunn and Dr. and Mrs. You executed and delivered to the Trustee a Quitclaim Deed for the property dated August 19, 1969, recorded in the Bureau of Conveyances of the State of Hawaii in Liber 6657 at Page 242.

On September 10, 1970, more than a year after the conveyance of the land to the Trustee, Dr. You entered into a stipulation with the Trustee whereby his various claims against the corporation would be allowed jointly with that of the other "Insider" stockholders, Dr. Herbert M. Nam, Dr. Timothy I. Wee, Eisho Toyama and Andrew Park as a subordinated stockholders' interest in the total sum of $180,000 "subordinate to all claims of other creditors and all interests of other stockholders allowed herein." They expressly stipulated that this was in

> "...full satisfaction of all claims by said claimants, whether as creditors or stockholders or otherwise, including any and all claims for interest, costs, and attorneys' fees, against YORK INTERNATIONAL BUILDING, INC., the debtor herein, the estate of York International Building, Inc. and AARON M. CHANEY, individually and as Trustee of York International Building,



Inc. and said claimants release said debtor, estate, individual, and Trustee from any and all further and other claims, interests, and liens of whatever nature."

This Stipulation was signed by Dr. Richard W. You, his wife, Eleanor S. N. You, and approved as to form by Edward Y. N. Kim, one of the present attorneys for the Appellants. (Record, Page 771). This Stipulation was approved by the court on November 16, 1970. (Record, Page 792).

No objection or question was ever raised by Appellants in the trial court as to compensation for the conveyance of the land to the Trustee or as to Dr. You's voluntary stipulation. The time for raising these questions has long passed. The land was conveyed to the Trustee over four years ago. Dr. You's stipulated claim was filed in court and approved by the court three years ago. It is far too late for the Appellants now to raise these issues for the first time before this court. These issues are entirely irrelevant to the present appeal.

5. THE COURT HAD FULL JURISDICTION TO CANCEL THE NAM AND DUNN LEASES AS ORDERS IN AID OF EXECUTION

OF ITS JUDGMENT. THESE ORDERS WERE NOT APPEALED FROM AND ARE NOW FINAL.

Appellants argue on Page 41 of their brief that the District Court lacked jurisdiction to hear and determine the petitions for cancellation of the Nam and Dunn leases. However, these leases (which were still of record but which should have been specifically cancelled under previous agreements) had to be cancelled in order to clear title to the property. These orders were necessary in order to enable the Trustee to carry out the sale of the real property as authorized by the court. These were orders in aid of execution of the court's judgment directing the Trustee to sell the property. The court's judgment was not superseded.

Moore's Federal Practice provides as follows:

> "The filing of a timely and sufficient notice of appeal has the effect of immediately transferring jurisdiction from the district court to the court of appeals with respect to any matters involved in the appeal. It divests the district court of authority to proceed further with respect to such matters, except in aid of the appeal, or to correct clerical mistakes under Rule 69(a) of the Federal Rules of Civil Procedure or Rule 36 of the Federal Rules of Criminal Procedure, or in aid of execution of a judgment that has not been superseded, until the district court receives the mandate of the court of appeals. ..." (Emphasis added.)

9 Moore's Federal Practice, Appeals to Court of Appeals, ¶ 203.11, Page 734.

At the trial court neither Dr. Nam nor Mr. and Mrs. Dunn, the only parties in interest, raised any question of the court's jurisdiction to issue these orders in aid of execution of the court's judgment. Both Dr. Nam and the Dunns subsequently executed cancellations of the leases. The time for appeal has expired. No appeal was filed. These orders have become final.

Appellants claim that these proceedings were void for lack of notice (Page 41, Appellants' brief) citing 11 U.S.C.A. § 606 (Bankruptcy Act § 206).

However, § 206 of the Bankruptcy Act (11 U.S.C.A. § 606) does not give the debtor, every creditor, stockholder and indenture trustee the right to notice of every step taken in the proceeding.

> "Two questions may arise: (1) whether § 206 gives the debtor, every creditor, stockholder and indenture trustee the right to notice of every step taken in the proceedings; and (2) if it does not, whether that fact creates any important difference between the status conferred by § 206 and the status conferred by formal intervention. The answer to the first question seems to be that <u>§ 206 does not of itself grant a right to notice of all steps</u> taken in the reorganization.

> In a particular case, the contrary construction might result in much unwarranted difficulty and expense. The requirements for notice in Chapter X have been constructed along more flexible lines. Certain provisions in the chapter state that notice shall be given and specify the persons to whom it shall be given, including creditors, stockholders and indenture trustees. Other provisions require notice but beyond that are silent. Section 207, however, gives the judge of the reorganization court the continuing power 'to enter orders designating the matters in respect to which, the persons to whom, and the form and manner in which notice shall be given.' Thus those matters deemed by Congress to be of paramount importance specifically require notice to the parties included within § 206; in other situations, the question of notice rests in the discretion of the judge, to be exercised either as to whom notice shall be given and the form thereof if notice is required by the statute without further specification, or as to whether notice shall be given at all and to whom, etc., in cases where Chapter X is silent. Thus, as remarked by Professor Gerdes, there seems to be adequate assurance that creditors, stockholders and indenture trustees will receive notice of all important steps in the proceedings. ..." (Emphasis added.)

6A Collier on Bankruptcy, ¶ 923, Page 307.

In the case of the Nam and Dunn leases, the court issued its Order To Show Cause citing Nam and Dunn to appear to show cause why their leases should not be cancelled. (Record, Page 1317). There was no necessity

for notice to the debtor or any other creditors or stockholders since none of them would be in any way adversely affected by the cancellation of the leases. The two leases were cancelled. Both Mr. and Mrs. Dunn and Dr. Nam subsequently signed specific documents cancelling the leases and they have not appealed from the decision.

Thus the Appellants' point, like the earlier points raised by Appellants, is without merit, is raised too late and is irrelevant to the present appeal.

6. THE RIGHTS OF APPELLANT YOU AND THE OTHER PARTIES IN THE DISTRIBUTION OF THE PROCEEDS OF SALE WILL BE DETERMINED IN ACCORDANCE WITH THE PRIORITIES ESTABLISHED BY THE BANKRUPTCY ACT AND THE STIPULATIONS WHICH THEY HAVE ALREADY ENTERED INTO.

Appellants argue at Page 41 of their brief that where a corporation is not insolvent, the stockholders are entitled to participate in a plan of reorganization. There is no question that this is the law.

However, in this case, no plan of reorganization has been approved. The court directed that the real property be sold. It is now apparent that no plan of reorganization can be effected under this estate and that bankruptcy must be proceeded with under § 236(2) of the Bankruptcy Act (11 U.S.C.A. § 636(2)).

The court's finding, cited by Appellants at Page 41 of their brief, that:

> "6. There is an equity in said property over and above all liens, encumbrances and interests."

clearly refers to equity over and above liens and claims directly against the property, not the claims of unsecured creditors to satisfaction from the estate ahead of its stockholders.

Appellants' assertion (at page 42 of Appellants' Brief) that debtor was solvent at the time of hearing is not supported by the record. To show solvency, the record would have to establish that the value of the building and land, the only substantial asset of debtor, exceeded $2,013,191.75 (net liabilities at March 31, 1973, page 42 of Appellants' Brief). However, the record showed and the court found that during all the years of administration of the estate (4-1/2 years at the time of the

Order Authorizing Sale of Real Property) no offer as high as $1,750,000 had been received for the property despite the Trustee's diligent efforts to sell it. (Order Authorizing Sale of Real Property, Record, Pages 1235-1243). Therefore, even if solvency were to be considered in connection with a sale of property, it was not present here.

When the monies are distributed in accordance with the bankruptcy procedures, the payments to creditors, stockholders and other parties in interest will be determined by the priorities established by the Bankruptcy Act and by the stipulations and court orders already entered into as to claims.

Appellant You's rights have already been determined by his voluntary stipulation and are not affected by the order appealed from. This question, like Appellants' other points, is also irrelevant to this appeal.

7. THE APPELLANTS HAVE NOT QUESTIONED THE CORRECTNESS OF THE TRIAL COURT'S FINDINGS OF FACT. THESE FINDINGS, UPON WHICH THE ORDER AUTHORIZING THE SALE OF REAL PROPERTY IS BASED, ARE UNDISPUTED AND THE ORDER SHOULD BE AFFIRMED.

At no place in the Appellants' brief have Appellants questioned the correctness of the findings of fact of the trial court, that it was in the best interest of the estate that the real property be sold and that the offer made by Mr. and Mrs. Lim was a fair and reasonable price for the property.

The trial Judge listened to the witnesses, judged their credibility, heard the arguments of the various opposing factions, some of whom favored the sale of the property and some of whom opposed it. After full hearing and after weighing all these factors the Judge made his findings and issued his order.

Rule 52 of the Federal Rules of Civil Procedure provides in part that

> "Findings of fact shall not be set aside unless clearly erroneous and due regard shall be given to the opportunity of the trial court the judge of the credibility of the witnesses".

The Federal Rules of Civil Procedure apply to bankruptcy cases by virtue of Bankruptcy General Order No. 37 which provides in part that

> "In proceedings under the act the Rules of Civil Procedure for the District Courts of the United States shall insofar as they are not inconsistent with the act or with these General Orders be followed as nearly as may be."

8. IN ANY EVENT, THE APPEAL IS MOOT AND SHOULD BE DENIED.

After the Appellants noted their appeal from the Order Authorizing Sale of Real Property, the Trustee petitioned the court for instructions and the court instructed the Trustee that, "Such order has not been stayed and the Trustee is, therefore, still authorized to proceed with the sale." (Record, Page 1311).

The purchasers, Mr. and Mrs. Lim, advised the Trustee that they intended to enforce the sale and demanded that the Trustee proceed to close the sale as ordered by the court. (Affidavit of Aaron M. Chaney dated July 6, 1973, filed with the Motion to Dismiss Appeal on July 11, 1973). Had the Trustee not proceeded to carry out the sale he, or the estate, or both, would have been subject to suit for breach of contract by the purchasers as well as possible liability to the creditors of the estate. Also, he would, or might, have been in contempt of court. The Trustee concluded that he had no choice to but consummate the sale. (Affidavit of Aaron M. Chaney dated July 6, 1973).

Accordingly, the Trustee proceeded to close the

sale. The purchasers paid the purchase price. The Trustee executed and delivered the deed and possession of the property to the purchasers. The deed was recorded. The moneys were disbursed from escrow and the sale was completely consummated. (Affidavit of Aaron M. Chaney dated July 6, 1973).

The Appellants knew that in spite of their appeal the Trustee was contractually obligated to complete the sale, that he had been ordered by the court to complete the sale and that the purchasers were insisting on his completing the sale. The Appellants, nevertheless, filed no supersedeas bond and made no motion to stay the sale.

When the sale was completed, title and possession of the real property were delivered to the purchasers. This removed the property from the jurisdiction of the court. The purchasers are not parties to this action or to this appeal. Their valid contract rights have attached and there is now nothing the Trustee can do to retrieve the property.

This appeal, aside from all its other shortcomings, presents nothing more than an academic question. It is moot and should be denied.

The law on this point is set forth in the Trustee's Memorandum of Law (Dismissal of Appeal which has become Moot by Consummation of Sale - No Supersedeas Bond filed) filed with this court on August 10, 1973 and will not be repeated here.

CONCLUSION

For all the above reasons, it is respectfully requested that this court affirm the District Court's Order Authorizing Sale of Real Property.

DATED: Honolulu, Hawaii, November 12, 1973.

BURGESS & GELBER

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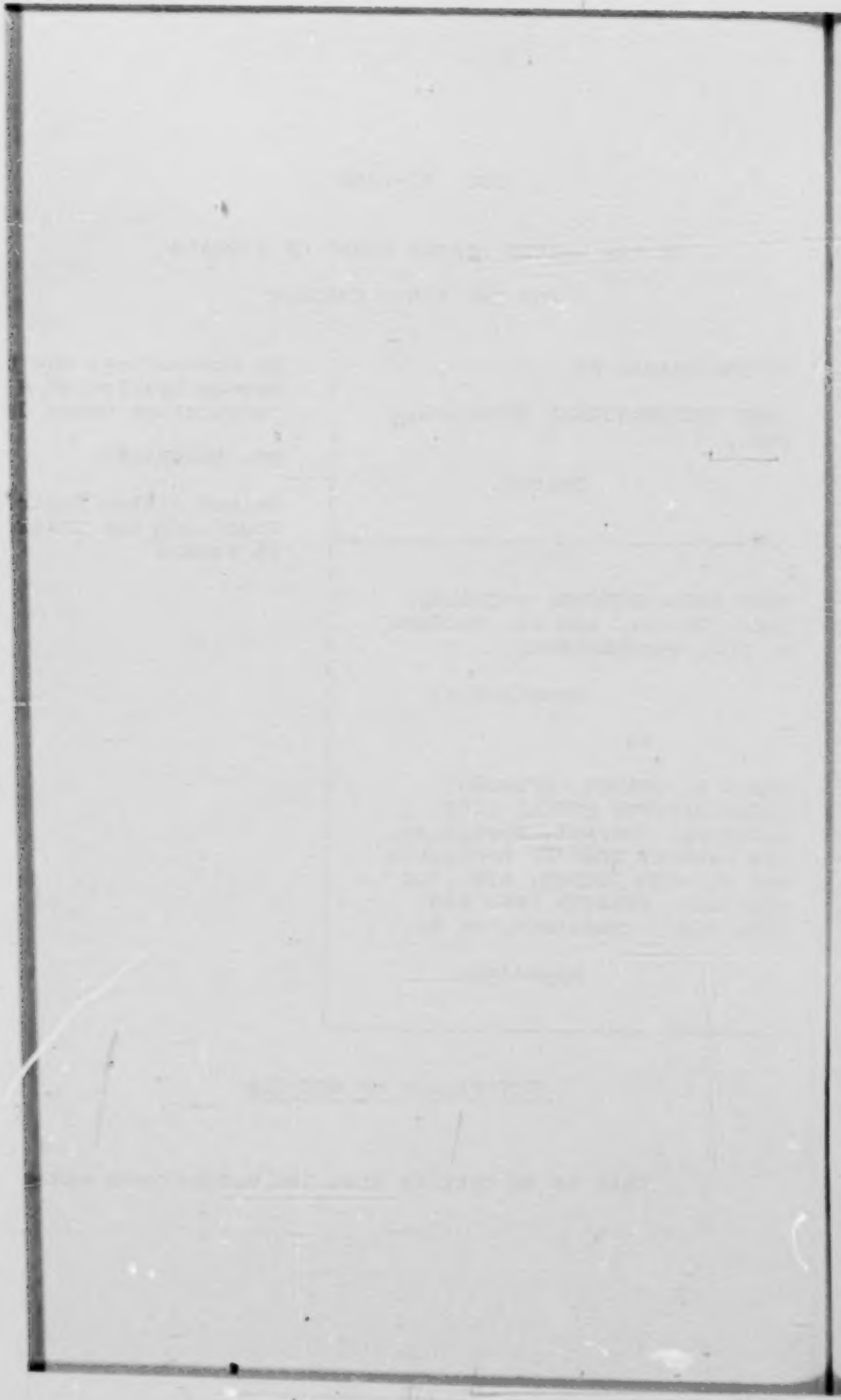
IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

In the Matter of YORK INTERNATIONAL BUILDING, INC., Debtor.	In Proceedings for the Reorganization of a Corporation Under Chapter X NO. BK-68-293 United States District Court, for the District of Hawaii
YORK INTERNATIONAL BUILDING, INC., Debtor, and DR. RICHARD W. YOU, Stockholder, Appellants, vs. AARON M. CHANEY, Trustee, MASSACHUSETTS MUTUAL LIFE INSURANCE COMPANY, Mortgagee, THE LIBERTY BANK OF HONOLULU, and MID-PAC LUMBER, LTD., of Honolulu, KENNETH DUNN and ROSE DUNN, creditors, et al., Appellees.	

CERTIFICATE OF SERVICE

This is to certify that the undersigned caused



the foregoing document to be duly served by mailing copies of the same in the United States mail with postage prepaid on November 14, 1973 and addressed to the following:

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